No. 75-1243

In the Supreme Court of the United States

OCTOBER TERM, 1975

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

LOCAL NO. 627, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO, *et al.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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INDEX

CITATIONS

Cases:

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v.

LOCAL NO. 627, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO, *et al.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, pp. 1a-21a)[1] is reported at 518 F. 2d 1040. The

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[1] The pertinent documents in this case, except for the judgment of the court of appeals, are contained in the appendices to the petition for a writ of certiorari in No. 75-1097 which

decision and order of the National Labor Relations Board (Pet. App. B, pp. 22a-84a) are reported at 206 NLRB 562.

JURISDICTION

The judgment of the court of appeals (App. A, pp. 18-19, *infra*) was entered on September 8, 1975. Timely petitions for rehearing and rehearing *en banc* were denied on November 4, 1975 (Pet. Apps. C and D, pp. 85a and 87a). On January 30, 1976, Mr. Chief Justice Burger extended the time in which to file a petition for a writ of certiorari to and including March 3, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, upon reversing a determination by the National Labor Relations Board that two affiliated firms constitute separate employers rather than a single employer, the court of appeals improperly itself decided that a single unit, comprising the employees of both firms, is the appropriate unit for collective bargaining purposes, instead of remanding the case to the Board to make that decision.

2. Whether the court of appeals improperly invaded the province of the Board by setting aside its finding that the two firms were separate employers,

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was filed by South Prairie Construction Company on February 2, 1976. That petition seeks review of the same judgment that we seek review of here. Accordingly, we have not reprinted the documents contained in the appendices to the petition in No. 75-1097; "Pet. App." as used here refers to those appendices.

where the Board applied the proper criteria for determining that issue and the court's disagreement with the agency involved primarily the inferences reasonably to be drawn from the facts.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*, are set forth in App. B, pp. 20-21, *infra*.

STATEMENT

A. The Board's Findings of Fact

The intervenors in this case, Peter Kiewit Sons' Co. ("Kiewit") and South Prairie Construction Co. ("South Prairie"), both are Nebraska corporations wholly owned by Peter Kiewit Sons', Inc. ("Inc.")[2] (Pet. App. B, pp. 28a, 31a-32a; A. 70A, 95A-96A). Kiewit has operated a highway and heavy construction business in Oklahoma for approximately 20 years (Pet. App. B, p. 32a; A. 49A-50A, 71A, 96A).

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[2] Both Kiewit and South Prairie maintain offices at Inc.'s headquarters in Omaha, Nebraska. Each corporation has its own telephone number on Inc.'s switchboard (A. 61A). Kiewit and South Prairie have separate bank accounts and maintain wholly independent accounting records (Pet. App. B, p. 25a; A. 79A-80A). Both South Prairie and Kiewit, for a standard fee, hire Inc. to perform accounting services, including the preparation of separate payroll checks (Pet. App. B, pp. 40a-41a; A. 62A, 76A-77A, 79A-80A).

"A." refers to the Appendix in the court of appeals, a copy of which is being lodged with the Clerk of this Court.

Since 1960 its employees have been represented by respondent Union [3] (A. 68A-69A, 97A).

As a result of Kiewit's collective bargaining agreement with the Union, Kiewit's labor costs were higher than its competitors' in Oklahoma, all of whom were nonunion. Consequently, in late 1971, Inc. decided that South Prairie—whose employees have never been represented by a labor organization (Pet. App. B, p. 32a; A. 79A)—should extend its operations to Oklahoma. South Prairie for 28 years had operated a river and highway construction business in several other states, but had never performed any work in Oklahoma (Pet. App. B, p. 32a; A. 48A-49A, 79A).

South Prairie began to engage in highway construction in Oklahoma in March 1972. Kiewit continued to do business in Oklahoma, bidding on certain highway construction jobs [4] (Pet. App. B, pp. 35a, 34a-35a n. 10; see *id.* at 42a n. 16, 63a-64a n. 44).

When South Prairie commenced business in Oklahoma, it hired J. M. Darveau as its president. Darveau, until then, had been Kiewit's area manager in Oklahoma. At South Prairie, Darveau replaced William H. Taylor, who also had been Kiewit's controller. As of March 1972, Kiewit and South Prairie

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[3] Local No. 627, International Union of Operating Engineers, AFL-CIO.

[4] Under Oklahoma law, however, Kiewit and South Prairie cannot bid against each other for highway and turnpike construction jobs offered by the State (Pet. App. B, p. 34a; A. 66A).

had no common officers and directors (Pet. App. B, p. 40a; A. 129A-132A).

South Prairie and Kiewit maintain separate offices in Oklahoma City,[5] with separate telephone numbers (Pet. App. B, p. 25a; A. 47A, 75A, 83A, 90A-91A). The companies have separate Oklahoma area supervisors and separate supporting office staffs (Pet. App. B, p. 25a; A. 80A-81A).[6] South Prairie uses its own tools and raw materials, which it does not share with Kiewit (A. 82A). South Prairie and Kiewit do lease heavy equipment to each other at the going rental rate (A. 54A, 59A, 75A-76A). When this occurs, an agreement is signed, and the

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[5] When South Prairie started transacting business in Oklahoma, it took over the office and adjacent storage yard which had been occupied by Kiewit; Kiewit moved to another location (Pet. App. B, pp. 42a-43a; A. 65A).

[6] Upon entering Oklahoma, South Prairie hired certain office employees and field supervisors from Kiewit (A. 52A, 80A). Additionally, South Prairie hired some of its regular employees from Kiewit, since Kiewit had just completed a project in Oklahoma, and its employees were available for new employment. This initial hiring included three members of Kiewit's "batch plant" crew from the Nowata job. (Pet. App. B, pp. 46a-47a; A. 51A-53A, 54A, 72A-73A, 82A, 90A, 112A-114A.)

Apart from this initial exchange, there has been no interchange of employees or supervisors between Kiewit and South Prairie (Pet. App. B, p. 44a; A. 55A, 81A). However, in June 1972, Kiewit sent one of its employees, Kenneth Bolding, to South Prairie to help build special equipment which Kiewit needed for one of its jobs. South Prairie billed Kiewit for the time and use of South Prairie's personnel and materials. Kiewit ntinued to pay Bolding as its own employee. (Pet. App. B, pp. 48a-49a; A. 105A-106A, 108A-110A, 126A-127A.)

respective corporate books are debited and credited accordingly (A. 54A, 60A, 76A, 77A).

Neither company has ever subcontracted work to the other, and each company submits separate job bids[7] (Pet. App. B, p. 25a; A. 66A, 72A, 77A). Each company has a different dollar maximum fixed by the Oklahoma State Highway Department for work which it may undertake (Pet. App. B, p. 25a).

Kiewit utilizes Inc.'s labor relations services; Richard Coyne, vice president of Kiewit and a director of Inc., establishes Kiewit's labor and personnel policies (Pet. App. B, p. 25a; A. 84A, 93A, 95A). South Prairie has never utilized Inc.'s labor relations services; since 1944, it has established and implemented its own labor policy (Pet. App. B, pp. 25a, 49a-50a; A. 96A, 98A-99A). South Prairie's labor policies in Oklahoma are determined and implemented by its president, Darveau, who is responsible only to South Prairie's board of directors (Pet. App. B, pp. 25a, 49a-50a; A. 60A, 67A, 74A-75A, 91A, 98A-99A).[8] He determines all wages and fringe benefits, and is ultimately responsible for hiring and fir-

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[7] See note 4, *supra*.

[8] Richard Coyne, who determines Kiewit's labor policies on behalf of Inc., testified that, while South Prairie's board of directors sets labor policies for that company, "they of course would get their instructions from Peter Kiewit Sons', Inc." (A. 98A). However, he added that President Darveau actually sets labor relations policies for South Prairie, that Inc. does not provide any labor relations services to South Prairie, and that "South Prairie is on its own as far as labor relations goes" (A. 99A).

ing of employees (A. 57A, 67A). Kiewit's employees receive union wages and health and welfare benefits; South Prairie's employees receive lower wages and no such benefits (Pet. App. B, pp. 25a, 44a).

On March 29, 1972, the Union's business representative asked Darveau to recognize the Union and to apply Kiewit's collective bargaining agreement with the Union to South Prairie's employees (Pet. App. B, pp. 35a-36a; A. 118A). Darveau refused. The Union made no claim that a majority of the operating engineers on South Prairie's payroll wanted the Union to represent them (Pet. App. B, p. 37a; A. 121A). On June 20, 1972, the Union asked Darveau to sign an agreement for South Prairie's employees, and Darveau again refused (Pet. App. B, p. 39a; A. 123A-124A, 125A). The Union thereupon filed a charge with the Board alleging that both Kiewit and South Prairie had violated Section 8(a)(5) and (1) of the Act by refusing to bargain collectively with the Union on behalf of South Prairie's employees (A. 128A).

B. The Board's Decision and Order

On the basis of the foregoing facts, the Board, disagreeing with the Administrative Law Judge, concluded that South Prairie and Kiewit were separate employers under the Act, and thus that South Prairie had no obligation to recognize the Union as the bargaining representative of its employees or to extend the terms of the collective bargaining agreement with Kiewit to South Prairie's employees. The

Board found, *inter alia*, that, "[a]lthough Inc. determined that South Prairie would operate on a nonunion basis, South Prairie's labor policy determinations within that framework are set by South Prairie's president, whereas Kiewit's labor policies are determined by an official of Inc." (Pet. App. B, p. 25a). The Board therefore dismissed the complaint (Pet. App. B, p. 27a).

C. The Court of Appeals' Decision

A divided court of appeals held that the Board's finding that "Kiewit and South Prairie are separate employers for purposes of the National Labor Relations Act is not warranted by the record" (Pet. App. A, p. 15a), and further determined that "Kiewit and South Prairie had [an] obligation to recognize Local 627 as the bargaining representative of South Prairie's employees [and] to extend the terms of the Union's agreement with Kiewit to South Prairie's employees" (Pet. App. A, pp. 19a-20a). The court remanded the case to the Board for entry of an appropriate remedial order (Pet. App. A, p. 20a).

Judge Tamm dissented "from this needless vacation of the Board's order," stating that "the majority simply has substituted its view of the facts for that of the agency to whom Congress has assigned the task of developing expertise over this type of factual affair" (Pet. App. A, pp. 20a-21a).

The court of appeals denied South Prairie's petitions for rehearing and rehearing *en banc;* four

judges voted for rehearing *en banc* (Pet. Apps. C and D, pp. 85a and 87a).

On February 2, 1976, South Prairie filed a petition for a writ of certiorari (No. 75-1097).

REASONS FOR GRANTING THE WRIT

1. The court of appeals improperly invaded the province of the Board when, after setting aside the Board's determination that the two affiliated firms were separate employers, it itself decided that the two firms constitute a single unit for collective bargaining purposes, instead of remanding the case to the Board to decide that question. Because it had found that the two firms were separate employers, the Board never had to consider whether, if they were a single employer, the entire enterprise would constitute an appropriate unit for collective bargaining purposes.

Under the Act, it is the Board, and not the reviewing court, that has the responsibility to determine the appropriate collective bargaining unit. In failing to give the agency the opportunity to perform that function and by itself exercising the authority that Congress has given to the Board, the court of appeals violated "a guiding principle of administrative law" (*National Labor Relations Board* v. *Food Store Employees*, 417 U.S. 1, 9) that "the function of the reviewing court ends when an error of law is laid bare" (*Federal Power Commission* v. *Idaho Power Co.*, 344 U.S. 17, 20), and that, after the agency's "error has been corrected," it should be given the

opportunity to enforce "the legislative policy committed to its charge" (*Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 145, quoted with approval in *Food Store Employees, supra*).

Section 9(b) of the Act directs the Board to "decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof * * *." Under this provision, the selection of an appropriate bargaining unit is a matter largely within the discretion of the Board "and the decision of the Board, if not final, is rarely to be disturbed" (*Packard Motor Co.* v. *National Labor Relations Board*, 330 U.S. 485, 491; see *National Labor Relations Board* v. *Metropolitan Life Insurance Co.*, 380 U.S. 438, 444).

It does not follow that, because the two firms in this case are a single employer, the entire enterprise must comprise a single bargaining unit. Indeed, the statute recognizes that the appropriate unit may be a "craft unit, plant unit, or subdivision thereof" and the Board frequently certifies units that constitute only a small segment of an employer's total operation.[9]

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[9] The determination whether two nominally separate employers are a single employer turns on factors different from those that determine whether two groups of employees should constitute a single bargaining unit. Compare *Radio Union* v. *Broadcast Service of Mobile, Inc.*, 380 U.S. 255 (criteria for deciding the single employer issue; see p. 13, *infra*),

In the construction industry, where it is common for the same enterprise to have two separate organizations, one to handle contracts performed under union conditions and the other to handle those performed under nonunion conditions (Pet. App. B, p. 23a),[10] the Board not infrequently has held that even though two such affiliated enterprises are a single employer, each enterprise is a separate unit for collective bargaining purposes. See *Central New Mexico Chapter, National Electrical Contractors Ass'n*, 152 NLRB 1604; *B & B Industries, Inc.*, 162 NLRB 832; cf. *Gerace Construction, Inc.*, 193 NLRB 645. If, upon laying bare the Board's alleged error in concluding that Kiewit and South Prairie are separate employers (but see point 2, *infra*), the court of appeals had remanded the case to the Board to determine what were the appropriate units, the Board might well have determined that the two enterprises are to be treated as separate units rather than as a single unit.[11]

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with *Packard Motor Co.* v. *National Labor Relations Board, supra*, 330 U.S. at 491-492 (appropriate bargaining unit issue). See *Central New Mexico Chapter, National Electrical Contractors Ass'n*, 152 NLRB 1604, 1608 (determination that two corporate entities constitute a single employer "does not necessarily establish that an employerwide unit is appropriate, as the factors which are relevant in identifying the breadth of an employer's operation are not conclusively determinative of the scope of an appropriate unit").

[10] See also Penfield, *The Double-Breasted Operation In The Construction Industry*, 27 Labor Law Journal 89 (1976).

[11] This is not a case which "present[s] the exceptional situation in which crystal-clear Board error renders a remand an unnecessary formality" (*National Labor Relations Board*

In view of the limited scope of judicial review of the Board's unit determinations, which are "rarely to be disturbed" (*Packard Motor Co., supra*, 330 U.S. at 491), the court of appeals would be likely to sustain such a Board determination. In denying the Board the opportunity to make that determination and instead itself making it in a way that may be inconsistent with the Board's view,[12] the court of appeals failed to give the necessary "due observance by courts of the distribution of authority made by Congress as between its power to regulate commerce and the reviewing power which it has conferred upon the courts under Article III of the Constitution" (*Federal Communications Commission* v. *Pottsville Broadcasting Co., supra*, 309 U.S. at 141). Cf. *Federal Power Commission* v. *Transcontinental Gas Pipe Line Corp.*, No. 75-584, decided January 19, 1976.

2. The court of appeals also impermissibly invaded the agency's function in making its threshold determination that Kiewit and South Prairie are a

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v. *Food Store Employees, supra*, 417 U.S. at 8), since here the Board never passed upon the unit issue and, as shown in the text, it could well rule that Kiewit and South Prairie, even though a single employer, are separate bargaining units.

[12] One consequence of the court's holding is that South Prairie's employees will be forced to accept a bargaining representative they had no voice in selecting and a contract they had no voice in approving. This could constitute an impairment of the fundamental statutory policy of affording employees the right to select a representative of their own choosing, or to reject representation altogether. Cf. *Local 57, Int'l Ladies' Garment Workers' Union* v. *National Labor Relations Board (Garwin Corp.)*, 374 F. 2d 295, 300-304 (C.A.D.C.), certiorari denied, 387 U.S. 942.

single employer. The decision whether affiliated firms constitute separate employers or a single employer, like the selection of the appropriate bargaining unit, is a matter primarily involving the Board's expertise (see *Iron Workers* v. *Perko*, 373 U.S. 701, 706), and the Board's judgment in such a matter is one that a reviewing court must respect as long as the Board has reasonably applied the proper legal principles to the particular facts. See *Miami Newspaper Pressmen's Local No. 46* v. *National Labor Relations Board*, 322 F.2d 405, 409 (C.A. D.C.).

In deciding that Kiewit and South Prairie are separate employers, the Board used the correct criteria. It considered (Pet. App. B, pp. 24a-25a) "interrelation of operations, common management, centralized control of labor relations and common ownership" (*Radio Union* v. *Broadcast Service of Mobile, Inc.*, 380 U.S. 255, 256). As long as the Board has applied the proper standards, a reviewing court cannot substitute its judgment for that of the Board with respect to the weight to be given the particular factors, the reasonable inferences to be drawn from the facts or the application of the legal principles to the facts. If the Board has made a "choice between two fairly conflicting views," the reviewing court must respect its choice. *National Labor Relations Board* v. *United Insurance Company of America*, 390 U.S. 254, 260 (quoting *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 488). See also *Consolo* v. *Federal Maritime Commission*, 383 U.S. 607, 620. Under these prin-

ciples, the court of appeals should not have rejected the Board's choice of the view that Kiewit and South Prairie are separate employers.

The undisputed facts summarized in the Statement (pp. 3-7, *supra*) show that, while South Prairie and Kiewit are wholly owned subsidiaries of Inc. and are engaged in related businesses, they are separate legal entities which have operated as separate enterprises for many years preceding the present controversy. They have different officers and directors, separate accounting records and bank accounts, separate offices and storage facilities in Oklahoma, and separate Oklahoma area supervisors with separate supporting office staffs. Neither company has ever subcontracted work to the other, each company submits separate job bids, and each company has a different dollar maximum fixed by the Oklahoma State Highway Department for work which it may undertake.

South Prairie and Kiewit operate with wholly different rank-and-file employees, who are paid different wage rates and receive different fringe benefits. Except at the outset of South Prairie's entry into Oklahoma (n. 6, *supra*), there has been no employee interchange between the two companies.[13] While Inc. has day-to-day control over Kiewit's labor and personnel policies, South Prairie's labor and personnel policies are set and controlled by its president, Dar-

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[13] Even the Administrative Law Judge, whose single employer finding was reversed by the Board, found "little evidence of transfers of [rank-and-file] employees between [Kiewit's] and South Prairie's payroll" (Pet. App. B, p. 44a).

veau. He has ultimate authority over the hiring and firing of workers, their work assignments, and the establishment of their wages and conditions of employment.

On the basis of these facts, the Board could reasonably conclude, as it did, that South Prairie and Kiewit were separate employers for purposes of the Act. Although the court of appeals stated that this conclusion "is not warranted by the record" (Pet. App. A, p. 15a), what it really did, as Judge Tamm pointed out in dissent (*id.*, p. 21), was to "substitute * * * its view of facts for that of the agency to whom Congress has assigned the task of developing expertise over this type of factual affair." In so doing, the court unduly emphasized Inc.'s ultimate authority over South Prairie, evidenced here by Inc.'s decision to move the nonunion South Prairie into Oklahoma (see Pet. App. A, pp. 11a-12a). The Board was entitled to discount this factor in view of the practice in the construction industry for the same enterprise to have separate union and nonunion organizations (p. 11, *supra*), and the absence of evidence that Inc. actually directed South Prairie's labor and personnel policies.[14]

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[14] It is also relevant that, before entering Oklahoma, South Prairie had been in existence for 28 years as a nonunion company. As the dissenting judge observed (Pet. App. A, p. 21a), "[t]his is not a case where a new non-union company is 'spun off' to draw away the union company's business." Cf. *National Labor Relations Board* v. *Royal Oak Tool & Machine Co.*, 320 F. 2d 77 (C.A. 6). See also Pet. App. B, p. 24a.

Wholly owned subsidiaries are always subject to control by the parent corporation. The court's reliance upon potential control—which the Board properly discounted—ignores the settled principle that the test "is not whether an unexercised power to control exists" (*American Federation of Television & Radio Artists* v. *National Labor Relations Board*, 462 F. 2d 887, 892 (C.A.D.C.)); rather, "[t]here must be something more in the form of common control * * * denoting an actual, as distinct from merely a potential integration of operations and management policies." *Miami Newspaper Pressmen's Local No. 46* v. *National Labor Relations Board*, *supra*, 322 F. 2d at 409. Here there is little evidence of an "actual * * * integration of operations and management policies," and certainly not enough to justify the court in rejecting the Board's determination that Kiewit and South Prairie are separate employers.

What the court of appeals has done in this case was to draw its own inferences from the facts the Board found, even though the Board's inferences were reasonable, and to substitute its own evaluation for the agency's of the weight to be given the various factors for determining single rather than multiple employer status. In so doing, the court exceeded the proper boundaries of judicial review.

3. The decision of the court of appeals, if permitted to stand, is likely to have a substantial impact on the Board's capacity effectively to administer the Act. Since under Section 10(f) of the Act, any per-

son aggrieved by a Board order "denying * * * the relief sought" may obtain review in the District of Columbia Circuit, this decision is likely to produce a significant amount of litigation challenging the Board's findings in situations similar to the one here, where for economic reasons an enterprise operates through two separate organizations.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MARCH 1976.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1974

[Filed Sep. 8, 1975, United States Court of Appeals for the District of Columbia Circuit, Hugh E. Kline, Clerk]

No. 73-2277

LOCAL NO. 627, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

SOUTH PRAIRIE CONSTRUCTION COMPANY
PETER KIEWIT SONS' COMPANY, INTERVENORS

PETITION FOR REVIEW OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Before: TAMM and LEVENTHAL, Circuit Judges and MILLER,* Judge, United States Court of Customs and Patent Appeals

JUDGMENT

This cause came on to be heard on a petition for review of an order of the National Labor Relations Board and was argued by counsel. On consideration

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* Sitting by designation pursuant to 28 U.S.C. § 293(a).

of the foregoing and in accordance with the opinion of this Court filed herein this date, it is

ORDERED AND ADJUDGED by this Court that the order of the Board is vacated and the case is remanded for issuance and enforcement of an appropriate order against respondents Kiewit and South Prairie.

Per Curiam
For the Court

/s/ Hugh E. Kline
HUGH E. KLINE
Clerk

Date: September 8, 1975

Opinion for the Court filed by Judge Miller.

Dissenting opinion filed by Circuit Judge Tamm.

A true copy:

Test: Hugh E. Kline, Clerk
United States Court of Appeals
for the District of Columbia Circuit

APPENDIX B

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are as follows:

Section 2. When used in this Act—

* * * * *

(2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly * * *.

* * * * *

Section 8(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a) of this Act.

* * * * *

Section 9(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: * * *.

* * * * *

Section 10(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint

has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *.

* * * * *

(f) Any person aggrieved by a final order of the Board * * * may obtain review of such order * * * in the United States Court of Appeals for the District of Columbia * * *. [T]he court shall proceed * * * to make and enter a decree enforcing, modifying * * * or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall * * * be conclusive.

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